

An initial Award was issued in this proceeding on April 2, 1992 granting claimant permanent partial disability benefits based upon a nine percent (9%) whole body functional impairment rating. On September 19, 1993, the claimant filed a request for review and modification of the initial Award. The Special Administrative Law Judge found that claimant's condition had not worsened and that claimant was not otherwise entitled to modification of his award. Claimant requested this review. The issues now before the Appeals Board are:

- (1) Whether claimant is entitled to modification of the Award entered April 2, 1992 because either his condition has worsened or the Award was inadequate;
- (2) Whether the Special Administrative Law Judge erred by appointing Robert A. Rawcliffe, M.D., to perform an independent medical evaluation when the doctor examined the claimant at respondent's request before the initial Award was entered; and
- (3) Whether claimant is entitled an award for attorney fees.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Special Administrative Law Judge should be modified.

- (1) Claimant injured his cervical spine on July 20, 1990. The parties entered into an agreed award dated April 2, 1992 wherein claimant was awarded permanent partial disability benefits based upon a nine percent (9%) whole body functional impairment rating as had been provided by Robert A. Rawcliffe, M.D.

Claimant's right to review and modification is governed by K.S.A. 1990 Supp. 44-528(a). That statute provides:

"Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the director for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review the director may appoint one or two health care providers to examine the employee and report to the director. The director shall hear all competent evidence offered and if the director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the director may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act."

The Appeals Board finds that claimant's functional impairment has not changed since the parties entered into the initial award. This conclusion is based upon the overwhelming weight of the medical evidence presented. Dr. Rawcliffe, the physician selected by the Special Administrative Law Judge in this review and modification proceeding to evaluate claimant, testified that he examined claimant in 1994 and that claimant's physical condition has not changed since he first examined him in December 1991. Also, although Dr. Blaty believes claimant has a thirteen percent (13%) whole body functional impairment rather than the nine percent (9%) functional impairment provided by Dr. Rawcliffe following the December 1991 examination, he could not say whether the disparate ratings were the result of examiner variability or a worsening of claimant's condition. Dr. Blaty said he probably would have given claimant a thirteen percent (13%) functional impairment rating in 1991 if he had seen him at that time.

Claimant's argument that the original award is inadequate is without merit. Claimant elected to enter into the initial agreed award based upon the nine percent (9%) functional impairment rating. A functional impairment rating cannot be viewed as unreasonable merely because another physician's would be higher. Based upon Dr. Rawcliffe's

testimony, the nine percent (9%) rating is reasonable. If claimant was not satisfied with the rating provided by Dr. Rawcliffe as a result of the December 1991 examination, he should have litigated that issue rather than entering into the agreed award. In the absence of fraud, undue influence, serious misconduct, or any of the other reasons listed in K.S.A. 1990 Supp. 44-528, the claimant cannot reopen his case to request increased benefits. Because claimant continues to work for respondent and his employment status has not changed since the initial Award, claimant cannot, and does not, argue that he now has a change or increase in work disability.

(2) The Special Administrative Law Judge did not err when he selected Dr. Rawcliffe to perform the independent medical evaluation for purposes of the review and modification proceeding. The Special Administrative Law Judge did not act arbitrarily or capriciously by selecting Dr. Rawcliffe. The doctor was the only physician to have examined claimant before the original Award was entered and, therefore, was in the best position to determine whether claimant's injury had worsened. The administrative law judges are given wide discretion in selecting physicians for independent medical evaluations and are encouraged to utilize those in whom they have confidence. The mere fact that the respondent requested the same physician to examine and provide an opinion of claimant's functional impairment during the initial stage of the proceeding neither taints nor destroys that physician's credibility.

(3) Claimant is entitled to the sum of \$500 for attorney fees for services his attorney performed in this post-award proceeding. Claimant is entitled to attorney fees pursuant to K.S.A. 1990 Supp. 44-536(g) which provides:

"In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for vocational rehabilitation, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of compensation, the attorney fees shall be paid from such amounts of compensation. If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees in accordance with this subsection and such fees shall be paid by the employer."

The parties agreed at oral argument that claimant's attorney spent a total of seven hours presenting this case to both the Special Administrative Law Judge and the Appeals Board. The Appeals Board finds five hundred dollars (\$500.00) is a reasonable attorney fee based upon the issues presented, work performed, and final outcome.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on August 7, 1995 should be modified to reflect that claimant is entitled to \$500.00 for the services of his attorney rendered herein; that the remaining findings and orders contained in that Award should be, and hereby are, adopted by the Appeals Board; that the initial Award entered in this proceeding on April 2, 1992 should not be modified, and remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Wichita, Kansas  
Vaughn Burkholder, Wichita, Kansas  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director